CHUAH TIM LAN

v.

RHB BANK BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HELILIAH MOHD YUSOF JCA
WAN ADNAN MUHAMAD JCA
[CIVIL APPEAL NO: K-01-50-07]
16 JULY 2008

CIVIL PROCEDURE: *Time - Extension of - Filing of supplementary record of appeal - Whether record of appeal failed to comply with substantive rules - Whether non-compliance an irregularity or a nullity - Abuse of process*

CIVIL PROCEDURE: *Appeal - Leave - Extension of time to file supplementary record of appeal - Whether record of appeal failed to comply with substantive rules - Whether non-compliance an irregularity or a nullity - Abuse of process*

CIVIL PROCEDURE: *Appeal - Record of appeal - Extension of time to file supplementary record of appeal - Whether record of appeal failed to comply with substantive rules - Whether non-compliance an irregularity or a nullity - Abuse of process*

This was an application by the applicant seeking leave for an extension of time to file a supplementary record of appeal from the date of receipt of the sealed order, the notes of evidence and the grounds of judgment of the High Court, to which the respondents objected. The main issue herein revolved around the record of appeal filed by the applicant, which was alleged to not adhere to the requirements of the Rules of the Court of Appeal 1994 ('Rules') and the relevant Practice Directions, and whether such non-compliance was an irregularity or a nullity.

Held (dismissing the application)
Per Suriyadi Halim Omar and Heliliah Mohd Yusof JJCA delivering the judgment of the court:

(1) The non-compliance of the Rules in relation to the impugned record of appeal was not an irregularity but a nullity. Furthermore, the applicant's conduct, as seen by its propensity to ignore and disregard the Rules and the Practice Directions,

was reprehensible. In this instance, the objection to the application was not just a mere technical objection to an application of extension of time to file a supplementary record of appeal based on delay, but founded on something more serious. It was not an appeal where the facts showed that a good record of appeal was filed earlier, although out of time, but an objection raised founded on the reasoning that the record of appeal filed here had not complied with the substantive rules. At best, it was an extremely defective record of appeal and statutorily unacceptable, and was tantamount to no record of appeal having been filed. There was thus no proper appeal record before this court, resulting in the leave sought to file the supplementary record of appeal being an abuse of the procedural process and an exercise in futility. It was inconceivable that the applicant had persisted in filing the motion, which besides being much ado about nothing had consumed precious judicial time. (paras 24, 25, 26, 28 & 29)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah permohonan pemohon untuk mendapat kebenaran bagi perlanjutan masa untuk memfail sesuatu rekod rayuan tambahan dari tarikh penerimaan perintah yang dimeterai, nota-nota keterangan and alasan-alasan penghakiman Mahkamah Tinggi, terhadap mana responden-responden membantah. Isu utama dalam kes ini berkenaan dengan rekod rayuan yang difail oleh pemohon, yang dikatakan tidak mengikut keperluan Kaedah-kaedah Mahkamah Rayuan 1994 ('Kaedah-kaedah') dan Arahan Amalan relevan, dan sama ada ketidakpatuhan sebegitu merupakan sesuatu luar aturan atau sesuatu pembatalan.

Diputuskan (menolak permohonan)
Oleh Suriyadi Halim Omar dan Heliliah Mohd Yusof HHMR menyampaikan penghakiman mahkamah:

(1) Ketidakpatuhan Kaedah-kaedah berkaitan dengan rekod rayuan yang disoal bukan merupakan sesuatu luar aturan tetapi sesuatu pembatalan. Tambahan lagi, kelakuan pemohon, seperti yang dilihat dari kecenderungannya untuk tidak mempedulikan dan tidak mengendahkan Kaedah-kaedah dan Arahan Amalan tersebut, patut dikeji. Di dalam kes ini, bantahan kepada permohonan ini bukan sekadar sesuatu bantahan teknikal terhadap sesuatu permohonan perlanjutan masa untuk memfail suatu rekod rayuan tambahan berdasarkan alasan kelewatan,

tetapi berasaskan sesuatu yang lebih serius. Ia bukanlah sesuatu rayuan di mana fakta-fakta menunjukkan bahawa rekod rayuan yang bagus telah difailkan lebih awal, walaupun di luar masa, tetapi sesuatu bantahan yang dibangkit berdasarkan penghujahan bahawa rekod rayuan yang difailkan ini tidak mematuhi kaedah-kaedah substantif. Paling baik pun, ia merupakan rekod rayuan yang sangat cacat dan tidak boleh diterima secara statutori, dan sama seperti tidak ada rekod rayuan yang difail. Oleh itu, tidak ada rayuan yang bagus di mahkamah ini, mengakibatkan kebenaran yang dituntut untuk memfail rekod rayuan tambahan menjadi sesuatu penyalahgunaan proses procedur dan sesuatu tindakan yang tidak berguna. Ia tidak dapat dibayangkan bahawa pemohon telah berkeras untuk memfail usul ini, yang selain merupakan tiada kepentingan langsung juga telah membuang masa kehakiman berharga.

Case(s) referred to:
Capital Insurance Bhd v. Kasim Mohd Ali [2000] 1 CLJ 269 CA ***(refd)***
Low Cheng Soon v. TA Securities Sdn Bhd [2003] 1 CLJ 309 CA ***(refd)***
Tan Siew Peng v. OCBC Bank (M) Bhd [1998] 2 CLJ 684 CA ***(refd)***

Legislation referred to:
Rules of the Court of Appeal 1994, r. 18(1), (4)(b), (c), (d), (e), (6), (7), (10)

For the appellant - Pyara Singh; M/s Andrew Paul & Assoc
For the respondent - P Thavaselvi; M/s Zul Rafique & Partners

[Appeal from High Court, Alor Star; Judicial Revision Application No: 25-08-2006]

Reported by Suresh Nathan

JUDGMENT

Suriyadi Halim Omar JCA:

[1] This application was heard by us and at the end of the hearing had unanimously dismissed it with costs. The applicant appellant (hereinafter referred to as the applicant) had sought leave for extension of time, to file the supplementary record of appeal from the date of receipt of the sealed order of the High Court, the notes of evidence and the grounds of judgment of the High Court of Malaya at Alor Star, Kedah Darul Aman.

[2] The antecedents were that the applicant had filed for a judicial review to quash the Industrial Court Award No. 51 of 2006 dated 13 January 2006 but was dismissed with costs (hereinafter referred to as the decision) by the learned judge. The decision date was 30 April 2007. As regards the award, the facts were that the Industrial Court had refused to reinstate a claim which was struck out earlier. The claim was filed by the applicant against the first respondent. Being dissatisfied with the decision she thereafter had filed a notice of appeal to this court on 21 May 2007.

[3] *Vide* a letter bearing the date 25 June 2007 the applicant had written to the High Court for the grounds of judgment and the notes of proceedings. On the same date the applicant had written in to the President of the Court of Appeal for an extension of time to file the records of appeal but was accorded a negative reply on 11 July 2007. The reason given was that the application had not complied with Practice Direction 1/1996. She should have written in to the President of the Court of Appeal by 21 June 2007. For purposes of this issue the relevant portion of the Practice Direction reads as follows:

> ... Untuk menyelaraskan prosedur memfailkan rekod rayuan dan untuk menyegerakan lagi prosiding di Mahkamah Rayuan, maka amalan berikut hendaklah diikuti bagi permohonan perlanjutan masa untuk memfailkan rekod rayuan atas alasan nota-nota keterangan tidak diperolehi dari YA Hakim.
>
> (1) Dalam tempoh satu bulan dari tarikh nota rayuan difailkan, sekiranya perayu belum lagi dibekalkan dengan nota-nota keterangan YA Hakim Mahkamah Tinggi selepas ianya dipohon, maka perayu hendaklah dengan serta merta memohon kepada Presiden Mahkamah Rayuan untuk perlanjutan masa memfailkan rekod rayuan. Satu salinan permohonan ini hendaklah dimajukan kepada peguam responden.

[4] The court, in its reply further advised the applicant that in the event she was interested in pursuing the appeal, a motion for extension should be filed in court. Despite the rejection by the President of the Court of Appeal the applicant had still proceeded to file the record of appeal on 16 July 2007; and this despite the applicant not having taken any steps, in the like of an abridgement application, to render the filing of the record of appeal regularised as earlier advised. The respondent had also ventilated in the course of the hearing, and not denied by the applicant, that it had

highlighted to the applicant in the affidavit in reply, of the need to remedy the situation before filing the record of appeal. Unfortunately it was also not heeded by the applicant.

[5] The next relevant sequence saw the applicant filing a supplementary record of appeal inspite of not having filed the record of appeal. In the supporting affidavit, the applicant had affirmed that as the sealed order, the notes of proceedings and grounds of judgment were yet to be received she was thus unable to gauge the reason for the dismissal of the judicial review. The applicant reasoned that she was thus unable to file the supplementary record of appeal. As if this unusual reasoning was not sufficiently confusing, the applicant then prayed that a month extension be granted, effective from the date of receipt of the notes of proceedings and the grounds of judgment, in order to file that supplementary record of appeal. Interestingly, again there was conspicuous silence in the supporting affidavit as to why the defects prior to the filing of the record of appeal had not been rectified in accordance with the advice of the court. This rectification was a statutory exercise that must be carried out first, before any supplementary record of appeal may be filed.

Conduct Of The Applicant

[6] As gauged from the above paragraphs, prior to the filing of the motion, delays in certain matters were witnessed, with one being the contravention of Practice Direction 2/1991. This Practice Direction demands that an application for the notes of proceedings must be made one week after the filing of the notice of appeal. In this case the application should have been made to the High Court by 27 May 2007 and not on 25 June 2007. No reason was forwarded for this obvious delay. The relevant portion of Practice Direction 2/1991 reads:

> (1) Dalam tempoh satu minggu dari tarikh notis rayuan difailkan, perayu hendaklah memohon kepada Setiausaha Hakim perbicaraan untuk dibekalkan satu salinan terperaku nota keterangan, melalui surat seperti berikut:
>
> Kepada:
>
> Setiausaha Hakim,
>
> Mahkmah Tinggi,
>
> ...

[7] The other delay was the said late application on 25 June 2007 to the President of the Court of Appeal. The supporting affidavit of the applicant had supplied no reason for the delay, in writing on 26 June 2007 for the extension, when the cut off point was sometime on 21 June 2007. The contravened Practice Direction was Practice Direction 1/96.

[8] Delay *per se* may not be fatal, but without supplying a reasonable explanation may have the effect of the court being unsympathetic to an applicant who wishes an extension of time. How is the court to exercise its discretion when the materials in support of the application are not before it? It is trite that the burden is on the applicant to supply sufficient material, to assist the court in its deliberation before exercising that discretion empowered by the Rules of the Court of Appeal 1994 (*Tan Siew Peng v. OCBC Bank (M) Bhd* [1998] 2 CLJ 684).

[9] To compound this, the applicant showed an outright show of defiance of the law when, in spite of being warned by two sources *viz.* the court and the respondent, the applicant ignored them and had filed the record of appeal, without rectifying the flaws first. The record of appeal was filed on 16 July 2007 by the applicant, allegedly within eight weeks from 21 May 2007 ie, the date the notice of appeal was filed, purportedly in compliance with Practice Direction No.1 of 1996.

[10] Even though the physical documents were filed and declared as record of appeal by the applicant, the contents told a different story. The contents were inadequate and had failed to adhere to the requirements of the Rules of the Court of Appeal 1994 (the Rules) and Practice Directions. We will start off by touching on the want of memorandum of appeal in the alleged record of appeal. Rule 18(1) in crystal terms had promulgated "that the appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively". The significance of this requirement is obvious as under r. 18(7) of the Rules, to qualify as a record of appeal, it shall comprise the memorandum of appeal and copies of certain documents of the proceedings in the High Court, as enumerated in r. 18(4). Without that memorandum of appeal the compilation of documents cannot

be said to qualify as a record of appeal. That record of appeal shall thereafter be filed at the registry within eight weeks after entry of the appeal. I reproduce this relevant provision:

> (7) The **memorandum** and copies above referred to which, together **shall be called the record of appeal,** shall be filed at the Registry within eight weeks after the entry of the appeal or within such further time as the Court may allow (emphasis mine).

[11] The relevancy of this memorandum of appeal cannot be understated, as it is from this document that any respondent or court will know what the appeal is all about. Everyone involved in the appeal process will instantly know the points of law or facts which are alleged to have been wrongly decided. Imagine the confusion if an appeal were to proceed without a memorandum of appeal, and imagine the time and costs already expanded or required to be further expanded, on account of non-adherence of the rules.

[12] Apart from the memorandum of appeal, to be part of the record of appeal, are copies of the proceedings in the High Court, which include certain documents as legislated under r. 18(4) of the rules. It reads as follows:

> (4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including:
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> (a) copies of the documents in the nature of pleadings, so far as is necessary for showing the matter decided and the nature of the appeal;
>
> (b) a copy of the Judge's notes of the hearing of the cause or matter in which the decision appealed against was given;
>
> (c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal, and subject to rule 101 if such documents are not in the national language, copies of certified translations thereof;
>
> (d) a copy of the judgment, decree or order appealed from;
>
> (e) a copy of the written judgment or grounds of decision of the Judge, or a copy of the agreed notes of judgment as prepared by the parties and approved by the Judge, if such written judgment, grounds of decision or agreed notes as approved is made available within the time limited for filing

A the record of appeal, provided that if the Court so orders, the absence of the written judgment, grounds of decision or agreed notes shall not prevent the appellant from proceeding with his appeal; and

(f) a copy of the notice of appeal.

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[13] It must be clarified at this stage that the ensuing facts were derived from the motion, the supporting affidavit and reply of the respondent only, hence the appearance of brevity of facts. Regardless of that brevity, it was undeniable that r. (4)(d) of the C rules had been breached. The latter provision demands a copy of the judgment, decree or order appealed from. Here, when the alleged record of appeal was filed on 16 July 2007 even the draft order was yet to be included in it. In fact the draft order was received by the respondent's solicitor only on 11 September 2007 D two months after the presumptive record of appeal had been filed. Only on 13 September 2007 did the first respondent's solicitors return the duly approved draft order to the appellant's solicitors.

[14] With the obvious admission by the applicant of writing to E the High Court for the notes of proceedings at the High Court rather late, apart from the admissions in the supporting affidavit of the motion, it was undeniable that the alleged record of appeal also did not attach the relevant notes of proceedings and the grounds of judgment hence breaching r. 18(4)(b) and (e) of the F rules.

[15] At the time when the record of appeal was filed there was also a failure to submit to the registrar a chronology of events, a requirement pursuant to r. 18(10) of the rules. This provision reads:

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(10) The appellant shall, when filing his record of appeal in the Registry, submit to the Registrar a chronology of events from the date the action or the application was filed in the High Court to the date of filing of the record of appeal in the Registry.

H **[16]** These requirements are also restated in Practice Direction 3/1992 read together with Practice Direction 1/1995. Mokhtar Sidin JCA in *Capital Insurance Bhd v. Kasim Mohd Ali* [2000] 1 CLJ 269 at 276 had occasion to state:

I It is the requirement of r. 18(10) that the appellant shall submit a chronology of events until the filing of the record of appeal. Rule 18(10) provides as follows:

(10) ...

There is no doubt in our mind that the supplementary appeal record (rekod rayuan tambahan) is part of the appeal record. At the very minimum the chronology of events will tell us when the sealed order was received by the appellant or its solicitors and when the supplementary appeal record was filed.

[17] Another breach of the rules occurred when the applicant failed to send to the respondent the draft index of documents to the respondent's solicitor for perusal, and if necessary, to object thereafter to its inclusion in the record of appeal. This requirement is set out in r. 18(6) of the rules. If any disagreement were to crop up then the matter could be referred to the registrar. This relevant rule reads as follows:

(6) A draft index of the documents to be included in the record of appeal shall be sent by the appellant's solicitors to the solicitors for the respondent who or (if more than one) any of whom may within forty-eight hours object to the inclusion or exclusion of any document. In the event of the parties being unable to agree, the matter shall be referred to the Registrar of the High Court who may require the parties to attend before a Judge of the said Court. The Registrar of the High Court as well as the parties shall endeavour to exclude from the record all documents ... that are not relevant ... Where in the course of preparation of the record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists on its being included, the record, as finally printed or typed shall, with a view to the subsequent adjustment of the costs of and incidental to such documents, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion was objected to.

[18] A scrutiny of r. 18 and its sub-rules here show that Parliament, in its desire to instil discipline in the world of civil litigation, has consistently alluded to the usage of the terminology "shall". Such usage of word, by due construction in the circumstances of the case, demands mandatory adherence of the rule and the sub-rules; anything less will detract from the intention of Parliament. The promulgation of rules of procedure import discipline and certainty in our judicial system and without them precision of action in the conduct of litigation by contesting parties, may not be achieved.

[19] Despite that construction, courts have not failed many a time to dictate that rules are generally legislated to facilitate and not impede the administration of civil justice. Put another way, technical objections should not take a front seat, hence the constant reference to the cliché that the relation of rules to the work of justice is to be that of a handmaiden rather than mistress.

[20] So when does the approval of discipline and certainty end, and compliance with the intention of Parliament be construed thereafter as impeding civil justice? It is trite that much depends on whether the non-compliance of a particular rule of procedure is an irregularity or a nullity. To arrive at a judicious decision, the facts of every case, mired in its distinguishing factors and peculiarities, together with the relevant rules must be comprehensively scrutinised and dealt with accordingly. At the end of the day, the power-holder that is the judge, unwittingly granted with discretionary powers by case laws, has a choice either to find the breach vis-a-vis the relevant rule, an irregularity or a nullity.

[21] Let us return to the mainstream and try to resolve the specific problem before us. Mokhtar Sidin JCA in *Capital Insurance Bhd v. Kasim Mohd Ali (supra)* at p. 278 had occasion to state:

> In our view the Rules and Practice Directions made by this court are to be obeyed and not to be broken. We would like to stress here that parties to an appeal must adhere and comply strictly with those Rules and Directions. Of late we found that there were numerous instances where parties had not adhered or complied with those Rules and Directions and we want to make it clear that they do so at their own risk.

[22] A case in point, *Low Cheng Soon v. TA Securities Sdn Bhd* [2003] 1 CLJ 309, Alauddin Mohd Sheriff JCA had occasion to state:

> It must be observed that the language used in r. 18(4)(c) is as follows:
>
> (4) The appellant shall attach to such memorandum copies of the proceedings in the High Court, including
>
> (a) …
>
> (b) …

(c) copies of all affidavits read and of all documents put in evidence in the High Court so far as they are material for the purposes of the appeal ... (emphasis added).

There is no doubt in our minds and we agree with learned counsel for the respondent that this rule is mandatory. There are abundant authorities decided in our courts to suggest that the word 'shall' when used in any legislation means 'obligatory'. However we do not propose to cite these authorities. Suffice it is for us to say that the word 'shall' used in r. 18(4)(c) of the Rule reflects a measure of mandatoriness in it. As this is a mandatory rule it must therefore be strictly adhered to.

[23] Even though the above remark of Alauddin Mohd Sheriff JCA was limited only to one provision, yet it was sufficient for the court to conclude that by virtue of the blatant disregard of r. 18(4)(c) of the rules, the appeal was not properly brought before the court. In the current case before this panel we were able to identify five (5) major provisions that had not complied with the mandatory requirements of the rules in the course of filing the record of appeal. The six provisions were rr. 18(1), 18(4)(b), (d) and (e), 18(6) and 18(10).

[24] With the discretionary power resting on this panel, and in exercise of a choice, it was our conclusion that what was filed on 16 July 2007 failed to qualify as a record of appeal due to its non-compliance of the requirements as led down by the rules. The non-compliance of the rules in relation to the impugned record of appeal was not an irregularity but a nullity and as such no record of appeal had been filed. To regurgitate factually no memorandum of appeal was indeed filed. The dearth of this compilation of documents was compounded further by the non-attachment of copies of the notes of proceedings at the High Court, grounds of judgment, the sealed order or even draft copy of the order of the decision, the chronology of events or for that matter the draft index of the documents.

[25] Non-compliance of the rules apart, the conduct of the applicant was reprehensible, and this came out strongly as seen by the propensity of the applicant to ignore and disregard the rules and the abovementioned Practice Directions. It was a conduct that was contumacious to say the least. In the course of the hearing of the motion, the respondent had canvassed that only an unsealed copy of this impugned notice of motion (encl. 5a) and supporting affidavit were served on the first respondent's solicitors on 11 September 2007. On 16 January 2008 the first respondent

had filed an affidavit in reply in opposition of that motion. However, the sealed copy of the motion and supporting affidavit were not served on the first respondent's solicitors. Notice of this hearing date had been sent by the learned deputy registrar of the Court of Appeal to both parties *via* letters dated 24 April 2008. Even though the non-service of the sealed motion and supporting affidavit to the respondent's solicitor did not prejudice the respondent in the circumstances of the case, it amplifies the applicant's nonchalance in complying with the rules.

[26] To summarise the appeal, the objection to the application was not just a mere technical objection to an application of extension of time to file a supplementary record of appeal based on delay, but founded on something more serious. It was not an appeal where the facts showed that a good record of appeal was filed earlier, though out of time, but an objection raised founded on the reasoning that the record of appeal filed here had not complied with the substantive rules. At best it was an extremely defective record of appeal and statutorily unacceptable. This panel, as stated above, had decided that it tantamounts to no record of appeal having been filed. With the dearth of such record, no proper appeal record thus was before us, resulting in the leave sought to file the supplementary record of appeal as being an abuse of the procedural process and an exercise in futility.

[27] Based on all the above reasons, we had rejected the motion with cost.

Heliliah Mohd Yusof JCA:

[28] I have read the judgment of my learned brother Suriyadi Halim Omar, JCA and I am in complete agreement with the reasons he has stated therein. However I wish to intervene further to state that it is inconceivable that the applicant had persisted in filing the motion before us whether it was done on the advice of legal counsel or otherwise.

[29] We have found the motion was filed as though the processes of the law would always afford alternate rules in every case. It is clear that even in the exercise of discretion there is no bottomless pit. This indeed was an application which besides being much ado about nothing, had consumed precious judicial time.